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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
WESTERN WIRELESS CORPORATION)
)
Petition for Preemption, Pursuant to)
Section 253 of the Communications Act, of)
An Order of the South Dakota Public Service)
Commission)

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CC Docket No. 96-45
FEDERAL COMMUNICATIONS COMMISSION
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REPLY COMMENTS OF AT&T CORP.

AT&T Corp. ("AT&T") hereby submits its reply comments on the petition for preemption filed by Western Wireless Corporation ("Western") in the above-captioned proceeding.^{1/}

These reply comments address several points raised by the Coalition of Rural Telephone Companies ("Coalition") and the Rural Telephone Coalition ("RTC").^{2/} The Coalition and RTC urge the Commission to resolve issues that were not raised by the Western petition and to do so in a manner that would essentially preclude wireless carriers from being designated as eligible telecommunications carriers ("ETCs"). These arguments conflict with the plain language of section 214 and the Commission's orders implementing the universal service provisions of the Act. The Commission should reject the Coalition's and RTC's discriminatory proposals, and instead act on the Western petition based on the language and intent of section 214.

^{1/} Petition of Western Wireless Corporation for Preemption of An Order of the South Dakota Public Utilities Commission ("Petition"), filed June 23, 1999.

^{2/} See Comments of the Coalition of Rural Telephone Companies ("Coalition Comments"); Comments of the Rural Telephone Coalition ("RTC Comments").

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I. THE APPLICATION OF LEC REQUIREMENTS TO CMRS PROVIDERS IS WELL BEYOND THE SCOPE OF THIS PROCEEDING AND WOULD CONFLICT WITH THE PLAIN LANGUAGE OF THE ACT AND THE COMMISSION'S ORDERS.

The Coalition and RTC argue that the designation of wireless carriers as ETCs, especially in rural areas, cannot be fully considered until the Commission resolves "uncertainties" with respect to the regulation of wireless carriers. For example, the Coalition claims that "the disparate and uncertain application of interconnection and LEC requirements to CMRS providers is an adverse public interest consideration."^{3/} It argues that the public interest "cannot be served by designating a carrier as an ETC for the purpose of fostering universal service objectives if that carrier does not have resale obligations, does not have to provide equal access to interexchange carriers and long distance choices to its end users, and does not have to participate in number portability . . ."^{4/}

The Commission should disregard these arguments for a host of reasons, both procedural and substantive. First, Western's petition for preemption of the South Dakota Public Utilities Commission's ("SDPUC") order is not a proper forum for the Coalition to re-litigate or continue litigating broader policy issues that it acknowledges the SDPUC did not reach. The SDPUC refused to certify Western as an ETC in any area, whether non-rural or rural, based on the faulty premise that a carrier must offer ubiquitous universal service before being designated.^{5/} The SDPUC did not reach the issue of whether, having otherwise met the requirements of section 214(e)(1), Western could also meet the public interest element required for designation as an

^{3/} Coalition Comments at 42.

^{4/} Coalition Comments at 43.

^{5/} Order at Conclusions of Law ¶ 6.

ETC in areas served by rural telephone companies.^{6/} The issue of what factors a state commission should or should not consider in deciding whether the designation of a particular carrier is “in the public interest” is, thus, well beyond the scope of this proceeding.

Second, the Coalition argues in favor of applying criteria to an application for ETC status that are outside the authority of state commissions. In some instances, the Coalition is simply trying to re-litigate issues already decided by the Commission.^{7/} In others, the Coalition would have the Commission amend the Act by fiat. For example, the Coalition contends that a wireless carrier cannot meet the public interest element in section 214(e)(2) if it has not been classified as a LEC and made subject to the obligations of section 251(b). For its part, RTC argues that states may impose an unbundling requirement “as a reasonable supplementary criterion” for ETC designation.^{8/}

The Coalition and RTC apparently believe that the recent Fifth Circuit Court of Appeals decision in *Texas Office of Public Utility Counsel v. FCC*^{9/} gave state commissions virtually unlimited power to ignore the plain language of the Act and the duties given to the Commission by Congress. This is not true. The Act explicitly excludes CMRS carriers from the definition of “local exchange carriers” except “to the extent that the Commission finds that such service should be included in the definition of such term.”^{10/} The Commission has declined to include CMRS carriers within the definition of “local exchange carriers.” The argument that now,

^{6/} *Id.* at ¶ 7.

^{7/} See, e.g., Coalition Comments at 42 n.114 (arguing against the Commission’s approach to the “local service area” for purposes of transport and termination, as codified at 47 C.F.R. § 51.701(b)(1) and (2)).

^{8/} RTC comments at 23.

^{9/} 183 F.3d 393 (5th Cir. 1999).

^{10/} 47 U.S.C. § 153(26).

despite Congress' explicit action and the Commission's intentional inaction, state commissions may impose LEC requirements on CMRS carriers in the context of a petition for ETC designation goes beyond even an expansive interpretation of the Fifth Circuit's decision. At least with respect to wireless carriers seeking ETC designation in areas served by rural telephone companies, this interpretation would allow state commissions to re-write the Act as they see fit.

Finally, the idea that a wireless carrier "can neither claim that it intends to fulfill all of the public interest objectives embodied in being an ETC nor can it expect that the public interest will be served in a competitive world if it is exempted from the basic requirements imposed on all other LEC ETCs" ignores the very situation that prompted Congress to authorize the certification of multiple ETCs. The obligations imposed in section 251(b) are most relevant to LECs operating in larger markets where they will be interacting with a number of other carriers. Rural areas, however, with their relatively low population density and concomitant high network costs, have seen few, if any, competing carriers offer service in competition with incumbent rural telephone companies. Imposing such obligations as resale on the first competitor in such an area makes no sense except from the perspective of an incumbent trying to protect its monopoly in that area. The "public interest" about which the Coalition claims to be concerned would be much better served by facilitating the entry into rural markets of wireless carriers, who are uniquely positioned to provide service to under-served markets, than by preserving rural areas as competition-free zones.

II. THE MINIMUM USAGE ISSUE SHOULD NOT BE ADDRESSED IN THIS PROCEEDING.

Both the Coalition and RTC suggest that the Commission's universal service regulations will be "incomplete" until the Commission imposes a minimum local usage requirement on

ETCs.^{11/} They argue either that states cannot pass on the “public interest” element of designation pursuant to section 214(e)(2) or that state commissions may require a certain level of local usage as an additional condition of designation as an ETC. This issue is no more appropriate for consideration in this proceeding than the issue of requiring that wireless carriers take on the obligations of LECs before being designated ETCs. Again, the SDPUC did not reach the “public interest” inquiry, and the criteria that the SDPUC might have applied if it had reached the issue is not a ground for Western’s petition.

In any event, the Commission has taken comments on the minimum local usage question, and the issue remains under consideration.^{12/} Unless or until the FCC specifies a local usage benchmark, state commissions cannot take it upon themselves to impose such a requirement as a pre-condition of ETC designation. Moreover, contrary to the Coalition’s and RTC’s contention that the Commission’s regulations are somehow incomplete without a minimum usage requirement, it is not at all clear that the Commission will find such a requirement to be consistent with the public interest. Indeed, as the Commission has recognized, it is extremely difficult to determine the appropriate amount of local usage without simultaneously erecting barriers to competitive and technologically diverse service offerings. This would violate the Commission’s directive that “any telecommunications carrier using any technology, including wireless technology, is eligible to receive universal service support if it meets the criteria under section 214 (e)(1) [and] any wholesale exclusion of a class of carriers by the Commission would

^{11/} Coalition Comments at 37; RTC Comments at 22-23.

^{12/} Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, FCC 98-278 (rel. Oct. 26, 1998), 63 Fed. Reg. 68224 (pub. Dec. 10, 1998).

be inconsistent with the language of the statute and the pro-competitive goals of the 1996 Act.”^{13/}

Ultimately, minimum local usage is simply another way for incumbents, such as those the Coalition and RTC represent, to raise a barrier to the entry of a class of potential competitors, wireless carriers.

III. THE REGULATORY STATUS OF FIXED SERVICES OF CMRS PROVIDERS IS NOT RELEVANT TO THE STATUTORY CRITERIA FOR ETC DESIGNATION.

The Coalition points to the Commission’s open proceeding on fixed wireless services as yet another pretext for state commissions to impose additional requirements on wireless carriers seeking ETC designation. They argue that “States cannot determine the public interest issues and impacts if they do not understand the regulatory status under which the provision of fixed or mobile services of CMRS providers may displace the provision of services by wireline providers.”^{14/} This is simply an attempt to eliminate an entire group of potential competitors.

In the absence of a definitive statement from the Commission on fixed wireless services, the states are fully capable of applying the statutory criteria in Section 214(e) and such definitive statements as the Commission has made on the subject of ETC designation. These statements include the unequivocal finding discussed above that “any wholesale exclusion of a class of carriers” would violate the Act and its pro-competitive goals. While the Coalition would like to resolve the “regulatory uncertainty” surrounding this class of potential competitors by simply eliminating them from eligibility for ETC status, nothing in section 214(e) or in the Universal Service Order would allow states to deny ETC designation to an entire class of carriers for any

^{13/} Universal Service Order, 12 FCC Rcd at 8858 ¶ 145 (May 8, 1997).

^{14/} Coalition comments at 34.

reason, much less because the Commission has an open proceeding that could have an impact on the future regulatory status of those carriers.

CONCLUSION

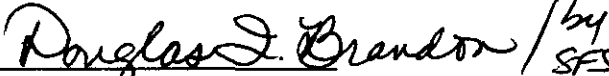
The SDPUC's Order in this case violates section 214(e)(2) and section 253(a) of the Act, and does not fall within the "safe harbor" of section 253(b). For the reasons set forth above, the Commission should reject the Coalition's and RTC's pleas to expand the scope of this proceeding and deny wireless carriers the ability to attain ETC status. Instead, the Commission should preempt the SDPUC's Order.

Respectfully submitted,

AT&T CORP.

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September 17, 1999

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I, Elizabeth A. Crowe, hereby certify that on this 17th day of September 1999, I caused copies of the attached "Reply Comments of AT&T Corp." to be sent to the following via hand delivery* or first class mail:

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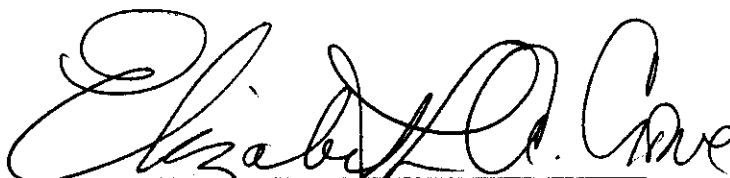
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